United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 387 *and* Mississippi Valley Chapter, Mechanical Contractors Association of Iowa, Inc. and Eastern Iowa Association of Plumbing, Heating and Cooling Contractors, Inc. Case 33-CB-1678

February 11, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND HUNTER

On August 10, 1982, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Parties filed exceptions and supporting briefs,[1] and Respondent filed a brief in response to the exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[1] The Mechanical Contractors Association of America filed an *amicus* brief.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: This case was heard in Rock Island, Illinois, on April 21, 1982, pursuant to an unfair labor practice charge jointly filed on May 1, 1981, by Mississippi Valley Chapter, Mechanical Contractors Association of Iowa, Inc., and Eastern Iowa Association of Plumbing, Heating and Cooling Contractors, Inc., herein called the Employer Group, against United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 387, herein called Respondent, and a complaint issued by the Regional Director on June 2, 1981, and an amendment to the complaint issued by the Regional Director on June 26, 1981. The complaint and the amendment to the complaint allege that Respondent violated Section 8(b)(3) of the Act by failing and refusing to bargain in good faith with the Employer Group concerning the inclusion in a succeeding collective-bargaining agreement then being negotiated with it of a provision which would require that future collective-bargaining disputes be submitted to the Industrial Relations Council for the Plumbing and Pipefitting Industry (hereinafter IRC and IRC clause) for final and binding resolution. The amendment to the complaint further alleges that Respondent had unilaterally modified the terms of the parties' preceding, but then current, collective-bargaining agreement by refusing to submit the issue of retention or deletion of the IRC clause to the IRC pursuant to the terms of that collective-bargaining agreement.

Respondent filed answers to the complaint and the amendment to the complaint which admitted that it had refused to bargain with the Employer Group concerning the inclusion of an "IRC interest arbitration clause" in the collective-bargaining agreement then being negotiated and that it refused and refuses to submit or to consent to the submission to the IRC of the issue concerning the inclusion of the IRC clause in the contract then being negotiated, but denied that the IRC clause was a mandatory subject of bargaining and denied that its actions constituted an unlawful modification of its then current collective-bargaining agreement with the Employer Group.

At the hearing, the parties submitted into evidence a joint stipulation of facts and certain joint exhibits, with expressed reservations, however, as to the relevancy or materiality of certain stipulated facts. Additionally, testimonial and documentary evidence was adduced by the Employer Group and Respondent. Except for certain very limited areas, the record consists of virtually undisputed evidence.

On June 9, 1982, the parties submitted briefs. Also on June 9, the Mechanical Contractors Association of America filed with me an untimely and opposed motion to grant an extension of time to file briefs in order to enable it to file a brief *amicus curiae*. That motion was denied.[1] On June 14, the Employer Group filed with me a motion later opposed by Respondent to file an answering brief. That motion was denied.[2] On June 22, Mechanical Contractors Association of America renewed its motion upon the erroneous assumption that the Employer Group's motion to file a reply brief would be granted. I denied the renewed motion.

Upon the entire record of the case, I make the following:[3]

[1] See National Labor Relations Board Rules and Regulations, Sec. 102.42.

[2] The Board's Rules and Regulations make no provision for answering briefs at this level of a proceeding.

[3] Respondent's unopposed motion to correct the record, attached to its brief, is hereby granted, and the record is corrected to reflect that Resp. Exhs. 2, 3, 4, and 5 were received into evidence, as indeed, the face of each exhibit so reflects by the marking of the court reporter.

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER GROUP

The Employer Group is comprised of two employer associations, each of which is composed of various corporations, partnerships, and sole proprietorships located throughout eastern Iowa and engaged in the business of mechanical plumbing, heating, and cooling construction work. The Employer Group, by its component members, annually imports goods valued in excess of $50,000 from suppliers located outside the State of Iowa directly to jobsites within Iowa.

It is admitted, and I find, that the Employer Group is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

The Mississippi Valley Chapter of Mechanical Contractors Association of Iowa, herein called the Mississippi Valley Chapter, and the Eastern Iowa Chapter of the Plumbing, Pipefitting and Air Conditioning Contractors, herein called the Eastern Iowa Chapter, are separate not-for-profit employer associations incorporated under the laws of the State of Iowa composed of various corporations, partnerships, and sole proprietorships located throughout the eastern Iowa area engaged in the business of mechanical plumbing, heating, and cooling construction work. The purpose of each association is, in part, to negotiate and execute collective-bargaining agreements on behalf of its respective employer-members with appropriate labor organizations.

Mechanical Contractors Association of Iowa, a statewide trade association since 1966, consists of various statewide local chapters. The Mississippi Valley Chapter was formed in 1971. At that time the Eastern Iowa Chapter and Mississippi Valley Chapter were competing multiemployer bargaining associations. The current executive vice president for the Mechanical Contractors Association of Iowa also serves as executive vice president of the Mississippi Valley Chapter and all other chapters in Iowa.

The Mississippi Valley Chapter as such and its individual employer-members are affiliated with the Mechanical Contractors Association of America, herein called the Mechanical Contractors Association, and are governed by its constitution. The Eastern Iowa Chapter as such and each of its employer-members are affiliated with the National Association of Plumbing-Heating-Cooling Contractors, herein called the Plumbers National Association.

Respondent is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, herein referred to as the International Union.

The majority of the employees of the Employer Group's component employer-members are members of Respondent. Respondent's members are all employees engaged in the plumbing, heating, and cooling construction work employed by the component members of the Employer Groups at various jobsites within Respondent's geographic jurisdiction but excluding professional employees, guards, and supervisors as defined in the Act. It is stipulated that these employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. At all times material herein, Respondent has been recognized by the Employer Groups and their members as the exclusive collective-bargaining representative of the employees of the employer-members of the Employer Groups in the foregoing units.

In the eastern Iowa area, the mechanical contractors have bargained in a multiemployer group with Respondent for over 20 years. Prior to 1971 when the two associations comprising the Employer Group bargained as one multiemployer group, it was known as the Davenport Association of Plumbing, Heating and Cooling Contractors.

From July 1, 1971, to the most recent negotiations, these mechanical contractors formed two multiemployer groups, the Mississippi Valley Chapter and the Eastern Iowa Chapter. On February 11, 1981, the two multiemployer groups began engaging in multiassociation bargaining with Respondent. There were collective-bargaining contracts between the Employer Groups and Respondent which were effective May 1, 1979, through April 30, 1981. It is stipulated that at all times material herein, and continuing to date, Respondent has been the exclusive representative for the purposes of collective bargaining of all employees in these units, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all employees in said units for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

2. IRC

For at least the past 12 years, the successive collective-bargaining agreements between the parties have contained the following or similar provisions as in article XVIII, commonly referred to as the Industrial Relations Council (IRC) clause:

> Section 2. If the parties have not concluded the settlement of a new working Agreement by the below specified dates the unresolved issues shall be submitted to the Industrial Relations Council for the Plumbing and Pipefitting Industry for a final and binding decision on said issues and there shall be no strike or lock-out of Employees after the termination of this Working Agreement or throughout the terms of the Succeeding Working Agreement.

Section 3. The parties subject to this Working Agreement agree to proceed with notification and negotiations as follows:

A. Agree to notify parties of intent to negotiate at least one hundred and twenty (120) days prior to the Agreement expiration date.

B. Agree to begin negotiations at least ninety days prior to the Agreement expiration date.

C. Agree to request joint submittal to the Industrial Relations Council at least sixty (60) days prior to the Agreement expiration date.

D. Agree to make total submittal of all documents and briefs to the Industrial Relations Council at least forty-five (45) days prior to the Agreement expiration date.

E. It is agreed that if the Union complies with the above requirements the Employers agree to retroactive pay beginning May lst of any year that this Agreement expires should a decision of the Industrial Relations Council not be rendered prior to that date.

F. It is agreed that negotiations between the parties will continue during procedures with the Industrial Relations Council.

The IRC was organized by the International Union, the Mechanical Contractors Association, and the Plumbers National Association approximately 31 years ago to resolve unsettled issues arising from local negotiations in the plumbing and pipefitting contracting industry. The IRC considers disputes arising during collective bargaining for a new contract concerning wages, hours, and working conditions after all local facilities for the settlement of such disputes have been exhausted and will also consider disputes, other than jurisdictional disputes arising under collective-bargaining agreements, if they have been processed through the parties' contractual grievances procedures without reaching resolution there.

On numerous occasions the IRC dispute resolution machinery was successfully involved to resolve disputes over various terms and conditions of collective-bargaining agreements. Disputes arising during collective-bargaining contract negotiations can be referred to the IRC by means of provisions in the parties' extant contract or, in the absence of such provision, by joint agreement. However, no dispute will be considered by the IRC if a strike, lockout, or other work stoppage exists.

The IRC is jointly funded for expenses of administration by equal contributions from the Mechanical Contractors Association, the Plumbers National Association, and the International Union, representatives of which at one time or another endorsed and urged incorporation of the IRC into local bargaining contracts.

The IRC panel is composed of eight members: two members from the membership of the Mechanical Contractors Association, two from the Plumbers National Association, and four from the International Union. The representatives of the Mechanical Contractors Association and the Plumbers National Association on the IRC panel are selected by presidents of the National Associations, upon recommendations made by local Employer Groups and later confirmed by the procedures established by each National Association. The president of the International Union appoints the IRC representatives who are confirmed by the International Union Executive Committee. The National Associations and the International Union hold their own conventions where their presidents are selected. The presidents of the National Associations and the International Union may remove their IRC representatives and select replacements.

The Charging Party draws an analogy to the negotiator selection process used for local bargaining. Respondent's local bargaining committee, for a number of years, selected its members by appointment of the local president based upon recommendations made by the business manager. The local president is elected by the members every 3 years. The local bargaining committee persons for the Mississippi Valley Chapter are chosen by the chapter president and approved by the executive board of the local union.

IRC committee persons are individuals actively employed in the plumbing and pipefitting industry who have had local level bargaining experience. They do not receive special compensation for their services expended during the IRC dispute resolution proceedings.

The IRC determines its own rules of procedure. Disputes concerning the terms and conditions of a collective-bargaining agreement are presented to it in a formalized structured manner. Disputes are submitted to it on preprinted forms. This form will constitute a listing of unresolved negotiation issues. IRC procedures set forth instructions for joint submissions of the parties. However, they also provide for separate submissions where disagreement exists upon the issues to be submitted. The IRC may in executive session, in its discretion, consider and resolve an issue submitted by only one party. It also will review form listings for correctness of form and propriety of submission. If separate submissions are made, the IRC executive secretary prepares a combined list of all issues submitted.

Written briefs in support of their positions are thereafter separately prepared by the parties and submitted to the executive secretary who, in term, distributes copies to each council member. The Council reviews the briefs in executive session. Thereafter, a "hearing date" or "meeting" is scheduled.[4] Opposing briefs are exchanged between parties prior to the meeting/hearing, and the parties notify the executive secretary of the identity of their representatives to appear before the Council.

At the IRC hearing/meeting, which is open for public viewing, after introductions, the executive secretary reads a statement of procedure. However, at the outset of these proceedings, according to customary IRC practice, the parties are urged to make another attempt to resume bargaining without IRC intervention. On occasions, the parties have excused themselves and have settled their differences at the 11th hour attempt, without participation of the IRC council members. The order of

[4] IRC Executive Secretary Edward Teske used the characterization, "hearing," as well as "meeting." He characterized the IRC as an "arbitration board," but elsewhere referred to the proceedings as "negotiations" and as a "contest."

oral presentation[5] and "rebuttal" are determined by chance. Council members put questions to the parties through the council chairman. After the parties have exhausted their oral presentation and "rebuttal," they are directed to leave and the Council then convenes privately in "executive session" where deliberation and discussion transpire among the council members, and only in the presence of the executive secretary, who takes notes and retrieves information. The representatives of the parties who made the presentation remain outside the room and are available as on occasion the Council has summoned a party's representative to answer a specific question raised by the Council.

During the executive session, the council chairman presides over a discussion of the issues. Various council members espouse various positions. Upon formal motion, a secret ballot is taken by the chairman. Unless that ballot is unanimous, discussions will continue. There have been occasions during such discussions when individual council members have left the room and talked to a representative of one of the local parties. The purpose and context of such consultation is unclear.[6] Prior to the meeting/hearing, local representatives have on occasion met with council members selected by their respective national organizations to discuss their positions privately in the absence of opposing representatives or other council members. During the executive session itself, management and union representatives routinely engage in private caucus wherein council members chosen by national organizations other than their own are excluded. Executive Secretary Teske testified in generalized, conclusionary terms of the nature of the discussions held in executive session. He likened such discussions to "negotiations." I find his conclusionary testimony of little probative value.

The IRC must reach a unanimous agreement. Otherwise, unresolved issues are remanded to the parties, who may bargain further, exercise economic recourse they deem appropriate, or drop the unresolved issues. If a decision is reached, it is incorporated in a typewritten formal "decision" signed by each council member and presented to the parties who are summoned back for its receipt.

On several occasions the IRC has been presented with a dispute over whether or not the IRC clause ought to be retained in a collective-bargaining agreement. On at least four of an unknown total of such occasions it decided not to include such a clause. In one such decision, its decision stated, *inter alia*:

> The Council recognizes the Union's complaint as to virtual perpetuity of the IRC clause in the pre-existing agreement. Therefore, they have been released from that provision in keeping with the Council's expressed purpose of serving as a voluntary medium for the adjudication of local deadlocked disputes. The parties are urged to conduct their future bargaining in an atmosphere of harmony, without resorting to strikes, deadlocks and other work stoppages. In the event they reach a deadlock at some future date, the Council stands ready to settle the dispute upon the voluntary submission of the parties.

3. The refusal to bargain

By letter of December 5, Respondent notified the Employer Group of its desire to negotiate a new collective-bargaining agreement to succeed the contract expiring on April 30, 1981. That same letter advised that Respondent would not discuss or negotiate the inclusion of an IRC clause in the new agreement on the grounds that Respondent did not believe that the IRC clause related to wages, hours, or other terms and conditions of employment; i.e, that it did not constitute a mandatory subject of bargaining. The Employer Group and Respondent met and negotiated towards a new collective-bargaining agreement on numerous occasions, including February 11, 17, 18, 19, 23, 24, and 26, March 3, 4, 5, 10, 17, 24, and 31, and April 7, 1981. During these negotiations, the Employer Group at several meetings requested bargaining concerning the inclusion of the IRC clause in the contract being negotiated but Respondent refused to discuss the matter. Respondent on March 13, 1981, submitted to the IRC a list of unresolved issues exclusive of the issue of retention of the IRC clause. Thereafter, on or about March 19, 1981, the Employer Group submitted several unresolved disputes to the IRC, including the dispute over the inclusion of the IRC clause in the successive collective-bargaining agreement under negotiation. Bargaining on subjects other than the IRC clause continued locally until the time of the IRC meeting on April 10, 1981.

Since on or about March 13, 1981, and at all times thereafter, Respondent has refused and continues to refuse to submit or consent to submission of the IRC clause dispute to the IRC or to bargain about the IRC clause. Contrary to the Employer Group, Respondent contends that the IRC process is a nonmandatory, permissive subject of bargaining.

Briefs were submitted to the IRC, and a meeting/hearing was held on April 10, 1982, at which both Respondent and the Employer Group made presentations through their representatives; i.e., local bargaining committee members. Executive Secretary Teske opened the meeting with a prepared statement which tended to characterize the meeting as an extension of collective bargaining and the IRC members as representatives of the local parties, i.e., those appointed by the national organizations were to be considered as representatives of the local constituent groups. That unprecedented statement had been prepared at the direction of the IRC legal counsel shortly before that IRC meeting.

Following an executive session it was announced that the Council had reached a unanimous resolution of issues presented with the exception of the issue concerning the contractual inclusion of the IRC clause. The written decision stated in regard to the unresolved issue, *inter alia*:

[5] Written resolutions of the disputes, entitled "Decisions," refer to the oral presentation as "testimony."

[6] Teske testified, without foundation, that prior to meetings and during meetings local representatives discussed their positions privately with members chosen by their national organization.

Since there was no unanimous agreement to consider inclusion or deletion of the IRC clause, the matter was not a subject of negotiation in the IRC and the parties are left to exercise their rights as they see fit with respect to this matter.

Subsequent to the IRC decision, the Employer Group and Respondent engaged in further negotiations on April 20, and by April 24 had resolved all issues except the IRC clause issue. Respondent insisted to the Employer Group that it would not bargain over the inclusion of the IRC in the new contract. Respondent forwarded to the Employer Group a copy of a collective-bargaining agreement which included all other agreed-upon terms; i.e., the IRC clause was not included. Respondent took the position that the IRC clause was a nonmandatory subject of bargaining and that the IRC had failed to resolve the issue and the Employer Group had no lawful basis for insisting to impasse on a nonmandatory subject of bargaining. Respondent therefore demanded execution of the agreement. Thereafter, the Employer Group advised Respondent that it would effectuate all terms and conditions agreed to by the parties as a result of collective bargaining, but that it was the opinion of the Employer Group that a complete agreement had not been reached and accordingly it continued to insist upon negotiations with respect to retention of the IRC clause. In consequence, the instant charge was filed on May 1, 1981.

B. *Conclusions*

Section 8(d) of the Act provides that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Although the parties are free to bargain about any lawful subject, the obligation to bargain does not extend to all subjects, nor to all areas of interest or concern to the parties, nor to all matters upon which agreement may directly or indirectly effectuate industrial peace. The statutory language imposing the bargaining duty has been defined and understood to limit the range of obligatory bargaining to subjects of "wages, hours, and other terms and conditions of employment." *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The limitation necessitates that "only issues that settle an aspect of the relationship between the employer and the employees" are to be mandated as topics of bargaining. *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, 404 U.S. 157, 178 (1971).[7]

Involved in the instant case is whether the IRC clause as a future contract dispute resolving mechanism or as a second level of the bargaining process is a mandatory subject of bargaining. The General Counsel contends that the IRC clause "must be deemed a mandatory subject of bargaining as an integral part of the collective-bargaining process directly relating to determination of dispute bargaining issues involving employees' wages, hours, and terms and conditions of employment." The Charging Party argues that the IRC is an integral part of bargaining and a "fundamental step to resolution of issues of concern to management and labor." The Charging Party likens the IRC clause inclusion topic to the subject of preliminary bargaining arrangements which have been found to be "just as much a part of the process of collective bargaining over wages, hours, etc."; i.e., time, place, length, and agenda of meeting, establishment of committee, etc.[8]

The General Counsel's assertion and the Charging Party's comparisons are overly broad and not definitively applicable to this issue. Thus, the topic of who will serve as the negotiators, i.e., the identity of negotiators, is a topic that could be defined as an integral part of bargaining comparable to bargaining arrangements. However, the Board has held that the subject of the identity or selection of a party's bargaining negotiator is not a proper subject upon which the parties are compelled to negotiate.[9] Yet the identity of the bargaining representatives may well be directly related to the efficacious resolution of disputes over wages, hours, etc., particularly if the selection of the negotiators involves designations of multiemployer committees or persons or committees possessed of vast experience, expertise, and dispute resolving facility.

Additionally, it can be argued that an arrangement for bargaining integrally related to the bargaining process is the subject of ratification by the union membership of a contract agreed upon by its representatives. That, however, has been held to be an internal matter and concern of the union, and not a subject of mandatory bargaining. *Sunderland's Incorporated*, 194 NLRB 118 (1971); *Joe Carroll Orchestras & Entertainment Agency, Inc.; et al.*, 254 NLRB 1158 (1981).

Another matter that can be loosely defined as an arrangement of bargaining, and an integral part of bargaining leading to settlement of disputes over wages, hours, etc., is so-called interest arbitration; i.e., the utilization of a future contract dispute resolving mechanism consisting of an independent, neutral third-party arbitration process. The Board, however, has consistently held that interest arbitration, despite its arguable benefits, is not a mandatory subject of bargaining and that neither party can compel the other to negotiate about a contract clause that would, in the event of new contract negotiation disagreement, in effect substitute a third party as final decisionmaker of disputed contractual terms. *The Columbus*

[7] *First National Maintenance Corp.* v. *N.L.R.B.*, 452 U.S. 666 (1981), and cases cited therein.

[8] The Charging Party cites Morris, "The Developing Labor Law," pp. 422–473 (1st ed. 1971), and "The Developing Labor Law, Cumulative Supplement 1971–75," p. 237 (1976).

[9] For example, situations where one party seeks to compel another party to agree to designating an association as bargaining representative. *Retail Clerks Union, Local 770, Retail Clerks International Association, AFL–CIO (Fine's Food Co.)*, 228 NLRB 1166 (1977); *Laborers' Local Union No. 652, Laborers' International Union of North America, AFL–CIO (Thoner & Birmingham Construction Corp.)*, 238 NLRB 1456 (1978). See further *Latrobe Steel Company*, 244 NLRB 528 (1979), enfd. in part 630 F.2d 171 (3d Cir. 1980), cert. denied 102 S.Ct. 104, 92 LC ¶13,018 (1981). Also read further the Charging Party's cited authority, Morris, "The Developing Labor Law," *supra*.

Printing Pressmen & Assistants' Union No. 252, Subordinate to IP & GCU (The R. W. Page Corporation), 219 NLRB 268 (1975), enfd. 543 F.2d 1161 (5th Cir. 1976); *Greensboro Printing Pressmen and Assistants' Union No. 319 (The Greensboro News Company)*, 222 NLRB 893 (1976), enfd. 549 F.2d 308 (4th Cir. 1977); *Sheet Metal Workers International Association, Local Union No. 38 (Elmsford Sheet Metal Works, Inc.)*, 231 NLRB 699 (1977), enfd. 575 F.2d 394 (2d Cir. 1978); *Massachusetts Nurses Association (Lawrence General Hospital)*, 225 NLRB 678 (1976), enfd. 557 F.2d 894 (1st Cir. 1977); *Sheet Metal Workers International Association, Local Union No. 59 (Employers Association of Roofers and Sheet Metal Workers, Inc.)*, 227 NLRB 520 (1976).

As I interpret its decisions, the thrust of the Board's rationale is that a clause which refers future contract disputes for resolution by a third party (an arbitrator or arbitration panel) is a matter that does not directly relate to wages, hours, and terms and conditions of employment. In *Sheet Metal Workers Local 59, supra* at 521 the Board stated:

> One can hardly conceive of a more fundamental right embodied in our Act than the right of both employees and employers to bargain collectively through representatives of their own choosing. Thus, while it is clear that the parties may agree to substitute another individual or entity to resolve disputes associated with the collective-bargaining process, it is also true that the right to select one's own bargaining representative is so basic and important that its relinquishment will not be casually imputed, nor will an initial waiver of that right in any way impair a party's right to demand that this nonmandatory topic not act as a barrier to any future negotiations. In the instant case, the Employers Association made clear from the outset that it would not agree to the present dispute resolution clauses in the negotiations for a new contract. This being so, Respondent was not privileged to insist upon the nonmandatory subject to the point of impasse.

The General Counsel and the Charging Party, however, cite *Mechanical Contractors Association of Newburgh*, 202 NLRB 1 (1973), in support of their contention that the instant IRC clause involves not interest arbitration, but rather merely a second level of bargaining. The General Counsel further argues that the theory of this case is premised upon the *Newburgh* case and that the facts and issues herein are identical to those in *Newburgh*, and it is therefore dispositive of the issues in this case. The *Newburgh* case did, indeed, deal with issues relating to the IRC clause which the parties therein had included in preceding contracts. The union therein, in negotiation for a succeeding contract, resisted retention of that clause. Other issues had been successfully negotiated. No agreement was reached on the IRC clause issue and wage issue. The employer in that case submitted those issues to the IRC. Both parties participated and filed briefs. The union argued that the IRC had no authority to compel the inclusion of an IRC clause in the new contract, but nonetheless agreed that it would abide by the IRC determination of the wage issue. The IRC decided the issue of wages and also directed the inclusion of the IRC clause. The General Counsel alleged violation of Section 8(a)(5). The Administrative Law Judge found that the employer engaged in an unlawful refusal to bargain. The Board construed his finding as being premised upon the theory that the IRC clause established the IRC as an arbiter of disputes over terms of future contracts and that such proposal was not a mandatory subject of bargaining. The Board majority opinion rejected the decision of the Administrative Law Judge and stated that its disagreement "goes primarily to his conclusion that the IRC clause endows the [IRC] with the kind of decisional authority traditionally associated with the arbitration process." The Board proceeded to make distinctions from the processes of third-party decisional arbitration, and to make comparisons to the process of negotiation. Based upon that comparison of procedures the Board concluded:

> Realistically, therefore, the presence of the IRC clause in a contract authorizes, as we view it, an extension of the collective-bargaining process by a different set of negotiators, once the individuals who have begun the negotiations are unable to compromise their differences.

The Board majority found "nothing offensive to national labor policies" that pursuant to internal structural relationships between the union and its international organization the international possessed authority to affect the terms of the contract by way of participation at the IRC level of bargaining. The Board majority opinion found that the employer did not violate Section 8(a)(5) of the Act by acting pursuant to established contract procedures in referring contractual disputes to the IRC over the union's objections. It was observed that there was no evidence that the employer would not have executed a contract excluding an IRC clause "had the next bargaining level—i.e., the [IRC]—unanimously agreed to resolve the bargaining dispute in that manner." It was therefore concluded that the employer therein had merely acted in accordance with contract terms in referring inclusion of the IRC issue "to the next level of bargaining." The Board further concluded that no impasse had occurred in bargaining inasmuch as it found the IRC "so integrated with the bargaining process that impasse could not occur until that body was unable to reach agreement." The Board concluded further, "At that point [failure of the IRC to reach agreement] it would be necessary to decide whether the collective-bargaining process was thwarted by one party's insistence on a nonmandatory subject as a condition of agreement. Since that did not occur here, we find it is unnecessary to decide whether the IRC clause embodies a nonmandatory subject of bargaining." The Board therefore rested its decision upon the conclusion that the IRC was, by agreement of the parties, an integral part of the collective-bargaining process and that the employer's adherence to that process which effectuated the entrance of the international union at a second level of bargaining did not violate its duty to bargain.

Thus, the *Newburgh* decision is not clearly dispositive of the issues in this case, which are not identical to the issues of *Newburgh*. Impasse in this case has been reached. Unlike *Newburgh*, it is necessary to decide herein whether the IRC clause is a mandatory subject of bargaining.

The General Counsel and the Charging Party focus their argument upon their position that the IRC clause, as concluded by the Board in *Newburgh*, does not constitute arbitral decisionmaking, but rather constitutes merely a second level of bargaining by a different set of negotiators, and as such is therefore so integral to bargaining as to necessarily constitute a mandatory subject of bargaining. A vast amount of analysis and argument is therefore engaged in by the parties herein as to the question of whether or not the IRC dispute resolving process is similar or dissimilar, procedurally, to a third, neutral party, decisionmaking arbitral process.

Respondent, however, with great cogency argues further that merely concluding that the IRC clause is a second level bargaining procedure does not necessarily resolve the ultimate question of whether it is a mandatory bargaining matter. Respondent argues that, even if it were to be concluded that the IRC process involves second level bargaining by a different set of negotiators, it still amounts to a nonmandatory subject of bargaining. Respondent points out that the purpose of the IRC clause is the same as that of interest arbitration, i.e., to provide a method for the resolution of future bargaining disputes, and as such does not involve directly the issue of wages, hours, etc., nor an issue directly impacting the relationship between employer and employee; i.e., it concerns itself with the relationship between the parties in bargaining. Respondent argues further that, if considered as second level bargaining, a demand to bargain over such a negotiating dispute resolution process amounts to a demand to bargain over the selection or substitution of bargaining negotiators, and as such constitutes a demand that can be rejected as a subject for negotiations by the other party.

Implicit in the arguments of the General Counsel and the Charging Party is the theory that the second level of bargaining involved in the IRC proceedings does not entail a substitution of parties, but merely involves a substitution of persons by international organizations who are loyal, responsible, and responsive to the local constituent members. Inherent in that contention is the admission that the subject of the IRC clause is in fact the identities and substitution of the parties' negotiators in those circumstances where disputes cannot be resolved by local negotiators. It is difficult to perceive why such subject should be mandated for bargaining when the Board and courts have clearly adhered to a policy of guaranteeing to the parties the right to freely designate negotiators of their own choice without placing upon them constraints of bargaining about such choice. Such right could hardly be characterized as "fundamental" if it extends only to limited areas. I conclude that the essential objection to the consideration of interest arbitration as a mandatory bargaining subject is that it is philosophically contrary to the concept of free collective bargaining which is the touchstone of the nation's labor relations policy. Interest arbitration commits the parties to a system whereby they subjugate their own judgment, representational authority, responsibilities, and obligations to a third party to determine not only disputed contractual issues, but also whether or not they must continue such subjugation in future contracts. They thus create a dispute resolution process which has the potentiality to subordinate indefinitely, if not perpetually, the desire of the parties to resume free collective bargaining. Thus, the Board and courts have viewed interest arbitration as a permissive subject which the parties may elect to discuss and agree to, but not one which, if agreed to, must be borne without future escape, nor a subject which either party must be compelled to discuss and negotiate under constraint of law and economic sanction.

Respondent presents compelling arguments that the evidence in this case reveals that the IRC dispute resolution process is not a manifestation of negotiations, but is rather an arbitration mechanism. Thus, the parties do not select a decisionmaker. Although the national organizations select council members, there is no evidence that the parties can reject the selection. The deliberations assume all the outward appearances of an adjudicative proceeding. The parties present oral argument and written briefs to those persons who are to make the ultimate decision. Presentation of formal argument and briefs to one's own supposed bargaining representative is, at least superficially, incongruent behavior. The council members deliberate in private, albeit there is some communication, apparently of a limited informational but not instructional nature, between the local parties and the council members appointed by the international organizations. As was not clear in the *Newburgh* case, the council members arrive at a formal unanimous decision only by means of a secret ballot. It is difficult to conceive a higher indicia of independence of decision and freedom from constraint than that manifested by the secrecy of deliberation and secrecy of ballot. Furthermore, there is no direct evidence that the council members are obliged to be responsive to the positions of the local members of their sponsoring national organization. It is implied, reasonably so, that persons appointed from management and persons appointed from unions will be sympathetic to the interests of their origins. However, this same mechanism is also utilized to arbitrate grievances arising under the contract. If each member guided himself solely by the instincts of his origins, no grievance would ever be resolved. Furthermore, bipartite arbitration panels are not self-contradictory and do exist.[10]

Assuming, however, that there is identity of interest and identity of party, if not person, between the international organizations and their local constituents, and that the IRC dispute resolution mechanism is indeed collective bargaining at a different level by a different set of negotiators, I agree with Respondent that such second tier of bargaining is not a mandatory subject of bargaining. It is therefore unnecessary to decide whether the IRC clause involves interest arbitration or second level bargaining, for in either case it involves a permissive sub-

[10] See *Sheet Metal Workers, Local 59, supra*, involving the National Joint Arbitration Board (NJAB).

ject of bargaining. Interest arbitration, if held a mandatory subject of bargaining, would tend to debase the essence of free collective bargaining. So-called second tier bargaining as described herein, if found to be a mandatory subject of bargaining, would amount to an unreasonable constraint upon not only the right of a party to negotiate through negotiators of its own choice, but also with the party's internal decisional process as to how its bargaining position will be determined and who will determine it. Such subject concerns neither the mechanical arrangements for negotiations, nor wages, hours, or any condition of employment. Nor does this subject impact upon the relationship between employer and employees. Accordingly, the subject of the IRC clause herein concerns a nonmandatory subject of bargaining. Therefore, Respondent did not violate the Act by refusing to bargain about the inclusion of the IRC clause in the new contract. Furthermore, inasmuch as the IRC clause in the preceding contract was a nonmandatory subject of bargaining, Respondent did not violate any bargaining obligation imposed by the Act by unilaterally abrogating that clause. Cf. *Allied Chemical & Alkali Workers of America, Local Union 1* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, 404 U.S. 157; *Finger Lakes Plumbing & Heating Co., Inc.*, 253 NLRB 406 (1980).

In light of the foregoing conclusions, I make the following recommended:

ORDER[11]

The complaint is dismissed in its entirety.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.